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In the Supreme Court of the United States

OCTOBER TERM, 1997

MANUEL GALVAO,
PETITIONER,

v.

THE GILLETTE COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT THE GILLETTE COMPANY IN OPPOSITION

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Respondent, The Gillette Company, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is unreported and is reproduced in the Appendix to the Petition (herein "App.") at 11.

STATEMENT OF THE CASE

Petitioner was discharged from his employment as a laboratory technician in the Boston Research and Development Division (BRAD) of Respondent The Gillette Company ("Gillette") for overall poor work performance and

insubordination in November 1993. Following his discharge, Petitioner, represented by counsel, Patricia L. Davidson, Esq., and the law firm of Kramer & Figman, P.C., in Dedham, Massachusetts, filed a complaint in the Superior Court for Norfolk County, Massachusetts, in March 1995. The Complaint alleged that Petitioner had been discharged because of his race and national origin, and also in retaliation for complaining about earlier alleged discriminatory acts against him, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e-1 *et seq.*, and also the Massachusetts Fair Employment Practices Act, Mass. G.L. c. 151B.

Gillette promptly caused the case to be removed to the United States District Court for the District of Massachusetts. Thereafter, the District Court entered a Scheduling Order designating February 15, 1996 as the date for completion of discovery and April 11, 1996 as the date for final pre-trial conference.

On November 13, 1995, Ms. Davidson and her colleague, Helen Horn Figman, Esq., filed a motion to withdraw their appearance as counsel for Petitioner on the ground that "communication between our office and the Plaintiff has deteriorated as a result of disagreement regarding the future course of the litigation of this matter." App. 45. Counsel did not indicate in their motion that Petitioner was seeking to proceed *pro se* and Petitioner himself did not file any separate notice of appearance *pro se* as permitted by Rule 83.5.2(b) of the District Court's Local Rules.[1] To the contrary, in an affidavit

[1] Rule 83.5.2(a) of the Local Rules of the U.S. District Court for the District of Massachusetts provides generally that "[t]he filing of the complaint shall constitute an appearance by the attorney who signs it," and that all other appearances in the case shall be made by filing a notice of appearance. Rule 83.5.2(b) then provides that:

> A party who appears *pro se* shall so state in the initial pleading or other paper filed by him or in his notice of appearance. The words "pro se" shall follow his signature on all papers subsequently filed by him in the same case.

accompanying the motion to withdraw, Ms. Davidson stated only that she had "advised the Plaintiff to retain [alternate] legal representation as soon as possible." App. 47.

On or about December 6, 1995, the District Court denied counsel's motion to withdraw. Promptly thereafter, counsel filed a motion for reconsideration and, once again, failed to include any indication that Petitioner was seeking to proceed *pro se*. Rather, counsel stated that Petitioner had repeatedly represented to them that he was in fact seeking new counsel, but that he needed more time to retain such counsel. App. 49-51. Counsel further stated that Petitioner had advised them that he would need ten to twelve months to obtain a new attorney. App. 49.

On January 12, 1996, the District Court denied the motion for reconsideration. The Court relied specifically on Rule 83.5.2(c) of the Local Rules of the District Court providing that, in the absence of a notice of appearance of other counsel, counsel of record may withdraw from a case only by leave of court.[2] App. 52-60.

The parties thereafter completed discovery and subsequently, pursuant to a schedule established by the court, Gillette presented a motion for summary judgment seeking dismissal of the Complaint. Counsel for Petitioner filed an opposition and a memorandum in support thereof. On July 30, 1996, after a hearing on the motion, the District Court entered a Memorandum and Order granting Gillette's motion for summary judgment. The Court reasoned that Gillette had articulated legitimate nondiscriminatory reasons for its

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[2] Rule 83.5.2(c) states:

> An attorney may withdraw from a case be serving notice of his withdrawal on his client and all other parties and filing the notice, provided that (1) such notice is preceded or accompanied by notice of the appearance of other counsel; (2) there are no motions pending before the court; (3) no trial date has been set; and (4) no hearings or conferences are scheduled, and no reports, oral or written, are due. Unless these conditions are met, an attorney (including one whose services have been terminated by his client) may withdraw from a case only by leave of court.

decision to discharge the Petitioner and that Petitioner had failed to produce any probative evidence that those reasons were a pretext for discrimination or retaliation against him. App. 12-43.

Petitioner, represented by new counsel, subsequently filed an appeal to the United States Court of Appeals for the First Circuit contending that he had, in fact, presented probative evidence that Gillette's articulated reasons for discharging him were a pretext for discrimination or retaliation against him and, further, that the District Court had improperly denied the motion of his prior counsel to withdraw their appearance. The First Circuit rejected both arguments on appeal. Like the District Court, the First Circuit reasoned that Gillette had articulated legitimate nondiscriminatory reasons for its discharge of Petitioner, and that Petitioner had failed to produce any probative evidence that those reasons were a pretext for discrimination or retaliation against him. App. 5-8. The First Circuit further reasoned that the District Court's refusal to permit Petitioner's prior counsel to withdraw was reviewable only for abuse of discretion and that, under the circumstances of the case, it could not say that any such abuse had occurred. The First Circuit noted particularly that, given the complexity of Title VII litigation, the District Court's conclusion that Petitioner was better off with counsel, even counsel with whom he had had a dispute over strategy, rather than being left to proceed *pro se*, was not unreasonable, especially since counsel had been bound by an ongoing ethical obligation "to prosecute [Petitioner's] case fully and effectively." App. 10. The First Circuit also observed that the District Court had advised Petitioner that, should Petitioner and counsel disagree on arguments to be presented, counsel was to present those arguments both in the form that Petitioner wished and in the form that counsel's legal judgment suggested. App. 10.

REASONS FOR DENYING THE WRIT

The writ should be denied because the decision of the First Circuit is consistent with the decisions of this Court, and of other courts of appeal, and the petition does not present any issue warranting review by this Court. More particularly, the decision of the First Circuit does not present the question asserted by Petitioner.

The District Court did not deny Petitioner the "right to represent himself" or to his "choice of counsel", as asserted in the petition, nor was the First Circuit confronted with those issues on appeal. Rather, the District Court merely refused to allow the motion of Petitioner's first counsel to withdraw until new counsel had been designated. This decision was a routine application of the court's Local Rule preventing the withdrawal of one counsel until new counsel is designated. Local Rule 85.5.2(c). The First Circuit affirmed the Court's decision on that basis.

If Petitioner had wanted to proceed *pro se*, he could have done so merely by filing his own notice of appearance *pro se* as permitted by Rule 83.5.2(b) of the Local Rules, or otherwise making a request to proceed *pro se*. There was nothing in the Local Rules or in the District Court's rulings which would have prevented Petitioner from taking such an action. Petitioner, however, did not make any request to proceed *pro se*. Rather, his counsel made a request to withdraw and asserted that Petitioner was attempting to obtain new counsel but would need ten to twelve months to do so. Petitioner in essence was seeking an extension of time to obtain new counsel. He was not seeking to proceed *pro se*.

Under the circumstances, the court was left with no choice, if it wanted to preserve the schedule it had previously established for the completion of discovery and the determination of dispositive motions, of either denying the motion of Petitioner's counsel to withdraw or compelling Petitioner to proceed *pro se* through the discovery and summary judgment proceedings despite his announced desire to obtain other

counsel. It was only in this context that the District Court denied the motion of counsel to withdraw, a ruling that was clearly reasonable under the circumstances of the case.

In light of his failure to make any request to the District Court to proceed *pro se*, or to substitute some other counsel of his choice, Petitioner's present assertions of improper denial of the right to proceed *pro se* or to obtain the counsel of his choice amount to nothing more than a type of "cat and mouse game" which numerous federal courts have repeatedly held is impermissible under the statute, 28 U.S.C. § 1654, preserving the right to proceed *pro se*. Thus, for example, in *United States* v. *Treft*, 924 F. 2d 978 (10th Cir. 1991), the United States Court of Appeals for the Tenth Circuit held that a criminal defendant had not been improperly denied the right to represent himself at trial since his request for such self-representation had been at best equivocal. In reaching this result, the Court said:

> [I]f a defendant in a criminal proceeding makes an equivocal demand on the question of self-representation, he has a potential ground for appellate reversal no matter how the district court rules. If the district court denies defendant's equivocal demand to represent himself, the defendant, on appeal, will argue that his constitutional right to self-representation has been denied. And if the district court grants defendant's demand for self-representation, the defendant, on appeal, will argue that his waiver of his right to counsel was not intelligent, knowing and unequivocal.

924 F. 2d at 979. The Court went on to conclude that, in order to avoid the possibility of any such "cat and mouse game", a defendant's election to represent himself in a criminal proceeding must be "clearly and unequivocally asserted." *See also United States* v. *Padilla*, 819 F. 2d 952, 959 (10th Cir. 1987) ("A defendant may not use the right to refuse representation by counsel to play a cat and mouse game

with the court."); *cf. Faretta* v. *California*, 422 U.S. 806, 835 (1975) (in order to represent himself accused must "knowingly and intelligently" waive his right to proceed with counsel).

In the present case, unlike the foregoing cases, Petitioner made no request at all to proceed *pro se*. Rather, as set forth above, his counsel indicated that Petitioner was searching for new counsel, but that he would need ten to twelve months to obtain such new counsel. Under the circumstances, Petitioner was not denied any right to proceed either *pro se* or with some other counsel of his choice. He was merely denied a period of ten to twelve months, or more, to make his decision. As the District Court explicitly noted, any other result would have been manifestly unfair to Gillette and inconsistent with the basic purpose of the federal rules to obtain a "just, speedy and inexpensive determination of any action." Fed. R. Civ. P.1. There is no reasonable basis for Petitioner's assertion to the contrary.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Dated: December 29, 1997